



Litigation Update

Litigation Section News

October 2008

Mediation agreement providing no confidentiality for settlement agreement enforced.

Evid. Code §1119 provides that matters disclosed in mediation are not admissible in subsequent litigation. This may even include a settlement agreement reached during mediation, thus making the agreement unenforceable. But the parties may stipulate either during the mediation or in the settlement agreement that the agreement will be admissible. *Evid. Code* §1123. Thus, where the parties had provided in their mediation agreement for confidentiality "except as necessary to enforce any agreements resulting therefrom," the settlement agreement was admissible and enforceable. *Estate of Thottam* (Cal. App. Second Dist., Div. 4; August 13, 2008) (As Mod. September 3, 2008) 165 Cal.App.4th 1331, [81 Cal.Rptr.3d 856, 2008 DJDAR 12650].

Note: Such a provision or a similar one is recommended to be contained either in the mediation agreement, or in the settlement agreement itself.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

Failure to move to reopen discovery voids order compelling production.

An order compelling discovery, after the discovery cut-off date, is void absent a motion to reopen discovery. In *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (Cal. App. Third Dist.; August 19, 2008) 165 Cal.App.4th 1568, [82 Cal.Rptr.3d 64, 2008 DJDAR 13025], plaintiff moved to compel responses to an inspection demand after the discovery cut-off date. The court granted the motion and sanctioned defendant. When defendant, thereafter, alleged it was unable to comply with all of the demands, the court struck its answer and entered a default. The Court of Appeal reversed. The trial court erred in ordering discovery after the discovery cut-off date where plaintiff had failed to file a motion under *Code Civ. Proc.* §2024.050 to reopen discovery.

Single sale over eBay does not confer personal jurisdiction in buyer's state.

Plaintiff bought a 1964 Ford Galaxie on eBay from a Wisconsin seller. When the car failed to meet his expectations, he sued the seller in Federal District Court in California. The Ninth Circuit affirmed the decision of the District Court dismissing the suit for lack of personal jurisdiction. The one-time sale of goods to a buyer in the forum state is not sufficient to confer personal jurisdiction over the seller. *Boschetto v. Hansing* (9th Cir.; August 20, 2008) 539 F.3d 1011, [2008 DJDAR 13106].

Defendant, who has been declared a vexatious litigant in a prior action, does not need permission to file an appeal. *McColm v. Westwood Park Association* (1998) 62 Cal.App.4th 1211, [73 Cal.Rptr.2d 288], held that a

plaintiff who has been declared a vexatious litigant must seek permission and may be required to post a bond before filing a notice of appeal. *Mahdavi v. Sup.Ct. (Portofino Beach Inn)* (Cal. App. Fourth Dist., Div. 1; August 20, 2008) 166 Cal.App.4th 32, [82 Cal.Rptr.3d 121, 2008 DJDAR 13130], holds that a similar requirement does not apply to a defendant because he does not initiate the action.

Plaintiff may voluntarily dismiss suit before court issues tentative ruling on summary judgment motion.

After the court rules on a motion for summary judgment, plaintiff can no longer voluntarily dismiss the suit. The same is probably true once the court issues a tentative decision on the motion. (See, Weil & Brown, *Civil Procedure Before Trial*, ¶¶ 11;25.1 ff.) But plaintiff may dismiss the action after the motion has been filed

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absent a formal indication as to how the court would rule. *Gogri v. Jack in the Box, Inc.* (Cal. App. Fourth Dist., Div. 1; August 25, 2008) 166 Cal.App.4th 255, [82 Cal.Rptr.3d 629, 2008 DJDAR 13555].

Retained control doctrine does not apply where safety measures delegated to contractor. When the hirer of an independent contractor retains control over the work in a manner that affirmatively contributes to the injury of a third party, the hirer may be liable to the injured party. But where the owner and general contractor delegated safety measures to the sub-contractor, they were not liable to the sub-contractor's employee. *Padilla v. Pomona College* (Cal. App. Second Dist., Div. 7; September 3, 2008) 166 Cal.App.4th 661, [82 Cal.Rptr.3d 869, 2008 DJDAR 13962].

California BFP statute not preempted by federal Bankruptcy Code. California's bona fide purchaser statute "renders an unrecorded conveyance void as to subsequent bona fide purchasers who record their title first." In *Burkart v. Coleman* (9th Cir.; September 4, 2008) [50 Bankr.Ct.Dec. 137, 2008 DJDAR 14022], after filing petition in bankruptcy, petitioners sold their home without authorization by the bankruptcy court.

Nor did they inform the buyers or their brokers that the house was part of a bankrupt estate. Because the proceeds of the sale would be part of the bankrupt estate, there is not inconsistency between the Bankruptcy Code and the bona fide purchaser statute and the Bankruptcy Appellate Panel appropriately held for the buyer and his lenders.

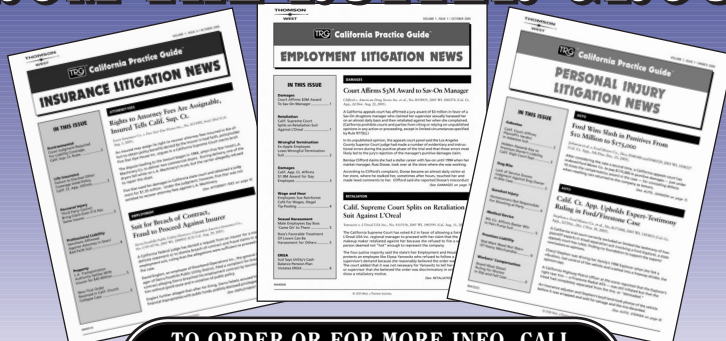
Prohibition of "mobile billboards" does not violate constitution. City ordinance banning vehicles used primarily for advertising promotes safety on the streets and does not violate the free speech guaranty of the U. S. Constitution. *Showing Animals Respect and Kindness v. City of West Hollywood* (Cal. App. Second Dist., Div. 1; September 9, 2008) 166 Cal.App.4th 815, [2008 DJDAR 14194].

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

Your participation is important and greatly appreciated.

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